80-392

No. _____

Supreme Court, U. S.
FILED
SEP 11 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO; LODGE #635,

Petitioners,

v.

CLARK B. RICHINS, BERNIE L. STARK, RALPH G. VICTOR, PAUL BENNETT, EARL F. DUSTIN, MIKE CLEM MERRILL, AND STEVEN R. HYMUS

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Of Counsel:

MULHOLLAND & HICKEY
1125 - 15th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 833-8855

EDWARD J. HICKEY, JR.
Counsel of Record

THOMAS A. WOODLEY
RICHARD J. HIRN
1125 - 15th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 523-4000

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED FOR REVIEW

Whether railroad employees must first exhaust the mandatory adjustment procedures set forth in the Railway Labor Act before bringing an action against a railroad for an alleged violation of a collective bargaining agreement and against a union for an alleged breach of the duty of fair representation in failing to protest the alleged violations in accordance with established grievance procedures.

PARTIES

In addition to the parties listed in the caption of this petition, the Southern Pacific Transportation Company, a corporation, and DOES 1 through 50, inclusive, were parties in the Court of Appeals (respondents).

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	4
ARGUMENT	5
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: PAGE

Andrews v. *Louisville & Nashville Railroad Co.*, 406 U.S. 320 (1972) 4, 8, 10

Elgin, Joliet & Eastern Ry. Co. v. *Burley*, 327 U.S. 661, 664-665 (1944) 8

Glover v. *St. Louis—San Francisco Ry. Co.*, 393 U.S. 324 (1969) 6,7

Goclowski v. *Penn Central Transportation Company*, 571 F.2d 747 (3rd Cir. 1977) 4, 5, 6

International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42, 49-50 (1979) 11

Roberts v. *Lehigh & New England Ry. Co.*, 323 F.2d 219 (3rd Cir. 1963) 4, 7

Union Pacific Railroad Co. v. *Sheehan*, 439 U.S. 89 (1978)..... 8, 9, 10

Vaca v. *Sipes*, 386 U.S. 171, 191 (1967) 11

STATUTES:

Act of June 21, 1934, Ch. 691, §3, 48 Stat. 1189, amending Act of May 20, 1926, Ch. 347, §3, 44 Stat. 578, 45 U.S.C. §153 First. (i) 2

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO; LODGE #635,

Petitioners,

v.

CLARK B. RICHINS, BERNIE L. STARK, RALPH G. VICTOR, PAUL BENNETT, EARL F. DUSTIN, MIKE CLEM MERRILL, AND STEVEN R. HYMUS

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Brotherhood of Railway Carmen of the United States and Canada; System Federation No. 114, Railway Employees' Department, AFL-CIO; Lodge #635; unincorporated labor organizations referred to as the Brotherhood of Railway Carmen (Union) in the judgment of the Court of Appeals, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, attached to Petition for Writ of Certiorari; filed by Southern Pacific Company, (Pacific Lines), No. 83-315) is reported at 620 F.2d 761. The opinion of the District Court (Appendix B, attached to Petition for Writ of Certiorari filed by Southern Pacific Company (Pacific Lines), No. 83-315) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1980. On July 18, 1980, Mr. Justice White extended the time for filing a petition for a writ of certiorari to September 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 3 of the Act of June 21, 1934, ch. 691, 48 Stat. 1189, amending the Act of May 20, 1926, ch. 347, section 3, 44 Stat. 578, 45 U.S.C. §153 First. (i), provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

STATEMENT OF THE CASE

This action was brought in United States District Court by seven employees and former employees of the Southern Pacific Transportation Company and who are or were members of the Brotherhood of Railway Carmen. In their Complaint the plaintiffs alleged that the Southern Pacific Transportation Company violated a collective bargaining agreement in effect between the Railroad and the Union by furloughing them at various times during the period of 1972 through 1975. The plaintiffs also alleged that the Brotherhood of Railway Carmen breached its duty of fair representation by failing to protest or grieve their furlough through the established grievance procedures. The plaintiffs seek to be reinstated to their former positions with the seniority and wages which they lost during the time that they were furloughed. The plaintiffs also seek punitive damages from the Brotherhood of Railway Carmen.

All defendants moved to dismiss the plaintiffs' Complaint in District Court on the ground, *inter alia,* that the plaintiffs' remedy lay in submitting their claim to the National Railroad Adjustment Board. The Brotherhood of Railway Carmen moved to dismiss on the additional ground that it did not breach its duty of fair representation by failing to grieve the plaintiffs' furlough because of a good faith decision and belief that the plaintiffs' grievance would be without merit. On the basis of largely undisputed facts, the District Court found that determination of the plaintiffs' claims were necessarily dependent upon different interpretations of seniority provisions of the collective bargaining agreements (and addenda therto) in effect between the Railroad and the Union. Accordingly, the District Court concluded that it lacked jursidiction over the plaintiffs'

claims because the unique provisions of the Railway Labor Act require presentation of such claims to the National Railroad Adjustment Board—the arbitral body created by Congress for the purpose of interpreting and applying railroad-union collective bargaining agreements negotiated under the Act. The District Court dismissed the Complaint without prejudice.

After this dismissal by the District Court, the plaintiffs submitted their claim to the National Railroad Adjustment Board, where it is now pending.

The plaintiffs also appealed the dismissal of their complaint to the United States Court of Appeals. The Court of Appeals reversed the decision of the District Court and held that the District Court had jurisdiction over the claims against the Railroad and the Union despite the fact that the plaintiffs have not yet exhausted the arbitral remedy provided by the Railway Labor Act.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals for the Tenth Circuit has rendered a decision which is in conflict on the same matter with the decisions of the Court of Appeals for the Third Circuit, specifically *Goclowski* v. *Penn Central Transportation Company*, 571 F.2d 747 (3rd Cir. 1977) and *Roberts* v. *Lehigh & New England Ry. Co.*, 323 F.2d 219 (3rd Cir. 1963).

2. The Court of Appeals has decided a substantial and important Federal question contrary to applicable decisions of this Court, specifically *Andrews* v. *Louisville & Nashville Railroad Company*, 406 U.S. 320 (1972), and *Union Pacific Railroad Co.* v. *Sheehan*, 439 U.S. 89 (1978).

ARGUMENT

I. The Decision Of The Court Of Appeals Is In Conflict With Decisions Of Another Federal Court Of Appeals

The holding of the Court of Appeals for the Tenth Circuit that the District Court has jurisdiction to consider an employee's claim that a railroad allegedly violated a collective bargaining agreement and that a union allegedly breached its duty of fair representation when it failed to grieve the alleged violation, even though the employee had not exhausted the mandatory adjustment procedures of the Railway Labor Act, is in direct conflict with the decisions of another United States Court of Appeals.

In *Goclowski* v. *Penn Central Transportation Co.*, 571 F.2d 747 (3rd Cir. 1977), as here, the court was called upon to resolve "critical questions concerning the boundaries of federal court power to intercede in disputes between the railroad employees, their union, and their employer." 571 F.2d at 750. The Court of Appeals for the Third Circuit affirmed the grant of summary judgment against railroad employees who brought an action against their employer for an alleged breach of a collective bargaining agreement and against their union for a breach of the duty of fair representation because the employees had not first submitted their claim to the National Railroad Adjustment Board. The employees claimed, *inter alia,* in *Goclowski* that their transfer resulting in less advantageous seniority positions and less desirable working conditions was not permitted by the collective bargaining agreements, and they

disputed the different reading of the agreements by their employer and union. The Court of Appeals stated:

> We agree with the district court that this . . . claim is for the [Adjustment] Board. No doubt may be entertained that this claim requires close examination of the pertinent collective bargaining agreements between the Union and the Railroad. We defer to the expertise of the Board in construing railroad labor contracts.

571 F.2d at 755.

The Court of Appeals thereby held in *Goclowski* that these employees could not litigate in federal court their claim against the railroad which involved an interpretation of collective bargaining agreements in lieu of submitting it to the Adjustment Board even though they also asserted a related claim of unfair representation against their union: "That the Union is joined as a defendant does not alter the basis of the claim which primarily involves contractual interpretation." 571 F.2d at 756. The decision of the Tenth Circuit Court of Appeals herein expressly rejects the *Goclowski* rationale and is therefore in clear conflict with the ruling of the Court of Appeals for the Third Circuit. 620 F.2d at 763.[1]

---

[1] The Third Circuit did recognize the significant distinction between this type of claim involving contract interpretation and the employees' additional allegation against the railroad and union which did not call for judicial definition of the terms of the agreements. 571 F.2d at 756-757. With respect to these latter issues, such as the question of whether the union was required to obtain employee ratification of an agreement the *Goclowski* court ruled that there was no need to defer to the expertise and exclusive jurisdiction of the National Railroad Adjustment Board. *E.g., Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324 (1969). The court in *Goclowski*, however, correctly rejected the argument that *Glover* precludes National Railroad Adjustment Board's

In another situation involving a controversy over the meaning of railroad-union contracts, the Third Circuit held:

> [I]f the resolution of the differences between railroad employees, on one side, and the railroad and the unions, on the other, depends on the interpretation of disputed terms of the collective bargaining agreement, then the dispute must be sent to the National Railroad Adjustment Board, which has exclusive primary jurisdiction to make the interpretation. (citations omitted).

Roberts v. *Lehigh New England Ry. Co.*, 323 F.2d 219, 222 (3rd Cir. 1963).

The principles adhered to in *Goclowski* and *Roberts, supra,* are founded on the longstanding labor policy embodied in the Railway Labor Act—namely, that the overriding public interest in peaceful labor relations in the field of rail transportation requires the submission of disputes regarding contract interpretation to the administrative body created by Congress for that very purpose. The fact that a union happens to be added as a party defendant for concurring with the railroad's understanding of the agreements and declining to pursue an employee's grievance which is based on his different view of the contract does not release the disgruntled employee from the statutory obligation to first present the dispute to the tribunal that is ac-

---

jurisdiction where a union is sued for breaching the duty of fair representation and the railroad is sued for breach of contract. The court properly understood *Glover* as not being "applicable when the basis of the claim is primarily construction and interpretation of existing collective bargaining agreements." 571 F.2d at 756, n. 13. Here, the Tenth Circuit declined to follow the Third Circuit's understanding of the *Glover* holding. 620 F.2d at 763, n. 3.

quainted with the unusual agreements, customs and practices in the railroad industry.[2]

II. The Decision Of The Court Of Appeals Is In Conflict With Decisions Of This Court

The Court of Appeals has decided that the National Railroad Adjustment Board is not the exclusive body for the interpretation of collective bargaining agreements in the railroad industry and for the settlement of disputes involving such interpretations. This holding is in direct conflict with the Railway Labor Act 45 U.S.C. §153 First (i) and the decisions of this Court in *Andrews* v. *Louisville Railroad Company,* 406 U.S. 320 (1972), *Union Pacific Railroad Co.* v. *Sheehan,* and 439 U.S. 89 (1978).

In *Andrews,* this Court unequivocally held that the Railway Labor Act gave the National Railroad Adjustment Board exclusive jurisdiction to settle disputes between a railroad employee and the employing railroad when these disputes involve an interpretation of a collective bargaining agreement. In so doing this Court affirmed the dismissal of a complaint brought by an employee in United States District Court who sought reinstatement with a railroad after an injury. This Court held that the employees' claim was "subject to the Act's requirement that it be submitted to the Board for adjustment" because the dispute turned on the extent of the railroad's obligation to restore the employee to his job following injuries in an accident. 406 U.S. at 324.

---

[2] It is significant to note that the National Railroad Adjustment Board's "expertise is adapted not only to interpreting a collective bargaining agreement, but also to ascertaining the scope of the collective [bargaining] agents' authority beyond what the Act itself confers, in view of the extent to which this also may be affected by custom and usage." *Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 327 U.S. 661, 664-665 (1944).

The holding of Andrews was reaffirmed in *Union Pacific R. Co.* v. *Sheehan, supra,* when this Court held that a decision of the National Railroad Adjustment Board was not only exclusive but final and could only be reviewed by a United States District Court on one or more of three specific grounds provided by the Railway Labor Act: failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; failure of the Adjustment Board to conform or confine itself to matters within the scope of its jurisdiction; and fraud or corruption. 45 U.S.C. §153 First(q); 439 U.S. at 93. This reversed a decision of the Court of Appeals for the Tenth Circuit which attempted to review and reverse an Adjustment Board award which denied a claim that was barred by a time limit imposed by the applicable collective bargaining agreement. The Court stated that Congress, in the terms, purposes and legislative history of the Railway Labor Act, mandated that the Adjustment Board possess this exclusive jurisdiction:

> In enacting this legislation, Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective bargaining agreements. See *Gunther v. San Diego & A.E.R. Co., supra; Union Pacific R. Co. v. Price, supra; Slocum* v. *Delaware L. & W.R. Co.,* 339 U.S. 239, (1950). The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. *Union Pacific R. Co. v. Price, supra,* at 611, (*Elgin J. & E.R. Co. v. Burley,* 327 U.S. 661, 664, (1946). *Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and*

> *out of the courts. Trainmen v. Chicago, R. & I.R. Co.*, 353 U.S. 30, (1957).

439 U.S. at 94. (emphasis supplied). Simply stated, these two decisions hold that a railroad employee's claim that his employer violated the collective bargaining agreement must first be submitted to the National Railroad Adjustment Board, whose determination may be reviewed by the Courts only on one or more of three specific grounds specified in the Railway Labor Act.

The decision of the Court of Appeals in the instant case is clearly contrary to the terms of the Railway Labor Act and these decisions of this Court which interpret the Act. The Court of Appeals held that the District Court improperly dismissed the plaintiffs' complaint and that the District Court had jurisdiction to interpret the collective bargaining agreement and settle the dispute arising out of it solely because the plaintiffs incidently named their union as a defendant for failing to process their claim. Although the Court of Appeals admitted that the Adjustment Board would have exclusive jurisdiction if plaintiffs had brought their suit solely against the Railroad, it stated that the unfair representation claim made their case a "hybrid" and therefore held that the District Court also had jurisdiction to settle the whole case, even though the dispute was, and still is, pending before the Adjustment Board. 620 F.2d at 762.

Attaching jurisdictional significance to this characterization of the case is unsupported by any language from *Andrews* or *Sheehan* and is at odds with this Court's underlying rationale in those two cases. Every intent and purpose which Congress had when it vested the Adjustment Board with exclusive jurisdiction over such claims is unaffected when a claim is asserted

against a Union so long as the individual employees can themselves bring their claims to the Adjustment Board, as they have done in the instant dispute.

The Court of Appeals reasoned that this "is not a case where the claims . . . against the Railroad and Union are so easily separable as to warrant bifurcating the proceeding—with the claim against the Railroad presented to the Board and the fair representation claim heard in federal court." *Id.* This reasoning, however, evidences a lack of understanding of what an unfair representation claim is, as interpreted by this Court. In order to breach the duty of fair representation when it refused to process as grievance, as in the instant dispute, the Union must "arbitrarily ignore a *meritorious* grievance or process in it [a] perfunctory fashion." *Vaca* v. *Sipes,* 386 U.S. 171, 191 (1967). (emphasis added). Therefore, in cases such as this one, a claim of unfair representation only arises after it has been established that a grievance was meritorious. And then, if the employee proves that the Union ignored his grievance or processed it in a perfunctory manner, he may recover only those additional expenses which he or she has incurred in enforcing the contract against the employer. The union cannot be held liable for damages attributable to the employer's breach of contract nor for punitive damages. *International Brotherhood of Electrical Workers* v. *Foust,* 442 U.S. 42, 49-50 (1979). Despite the Court of Appeals belief that "the claim[s] . . . against the Railroad and the Union are [not] so easily separable," they must, by law, be separable. If the Adjustment Board in its expertise concludes that the employee's claims are not meritorious, the employees are precluded from litigating their claim against the Union.

The Court of Appeals has answered a substantial and important federal question clearly contrary to applicable decisions of this court. Moreover, if its decision is allowed to stand, another substantial and important federal question will be generated: how does one resolve the conflict when the Adjustment Board renders an award for one party in a dispute such as this one, and a District Court, exercising jurisdiction created for it by the Court of Appeals, rules for the other party?

CONCLUSION

The central issue in this case is whether a bare claim that a union has breached its duty of fair representation in handling a grievance is sufficient to render unnecessary resort to the compulsory and exclusive dispute resolution procedures set forth in the Railway Labor Act, and to vest the federal courts with jurisdiction to decide the merits of a railroad employee's grievances. Because the Court of Appeals has allowed for concurrent jurisdiction between the National Railroad Adjustment Board and the Courts in resolving "minor" disputes, it has created the definite possibility that these two forums may reach different results in the same case. The effects of this decision can only interfere with stable labor relations in the rail industry, contrary to the goal of national labor policy. Moreover, the conflict between the decision of the Court of Appeals here and that of the Third Circuit in *Goclowski* underlines this problem and warrants resolution by this Court.

Accordingly, the petitioner prays that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

Of Counsel:

MULHOLLAND & HICKEY
1125 - 15th Street., N.W.
Suite 400
Washington, D.C. 20005
(202) 833-8855

EDWARD J. HICKEY, JR.
Counsel of Record

THOMAS A. WOODLEY
RICHARD J. HIRN
1125-15th St., N.W.
Suite 400
Washington, D.C. 20005